

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>LUIS S. BOWERS</b>	)	
Claimant	)	
VS.	)	
	)	
<b>SPIRIT AEROSYSTEMS, INC.</b>	)	Docket No. 1,052,973
Respondent	)	
AND	)	
	)	
<b>INSURANCE COMPANY OF THE STATE</b>	)	
<b>OF PENNSYLVANIA</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appeals the November 30, 2010, preliminary hearing Order of Administrative Law Judge John D. Clark (ALJ). Claimant was awarded medical mileage in the amount of \$43.50 but denied temporary partial disability compensation (TPD) as claimant's injury was found to be a scheduled injury under K.S.A. 44-510d.

Claimant appeared by his attorney, Roger A. Riedmiller of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Eric K. Kuhn of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held November 30, 2010, with attachments, and the documents filed of record in this matter.

**ISSUES**

1. What is the nature and extent of claimant's injury? Claimant contends the ALJ erred in denying claimant TPD as it is yet to be determined whether claimant's injuries are limited to a scheduled injury under K.S.A. 44-510d or are a whole body injury under K.S.A. 44-510e. Respondent contends the Board does not have jurisdiction over this issue on an appeal from a preliminary hearing order.

2. Did the ALJ err in denying claimant TPD? This issue will be determined by the findings of the Board from Issue No. 1.
3. Does the Board have jurisdiction to decide the above issues on an appeal from a preliminary hearing order?

### **FINDINGS OF FACT**

Claimant alleges he suffered a series of injuries beginning on September 17, 2010, and continuing each working day thereafter. Claimant contends the ALJ erred in denying TPD in this matter, as it has not been determined whether claimant's injuries are scheduled or to the whole body. However, the ALJ, in the Order, found that claimant had a scheduled injury. This finding is one of nature and extent. Claimant contends that claimant continues under the care of David T. Gwyn, M.D., and the nature and extent of his injury is yet to be decided. Claimant goes on to argue that it is possible that claimant could overcompensate for his right upper extremity injury by excessively using his left upper extremity. This could possibly lead to bilateral upper extremity problems and a permanent total disability finding. Claimant also argues that the condition in claimant's right upper extremity has been diagnosed as carpal tunnel syndrome (CTS) and this condition could lead to nerve problems in claimant's cervical spine.

Claimant further argues that claimant could experience medical malpractice and suffer a whole body injury result. Additionally, claimant contends that he could be involved in an automobile accident on the way to a doctor's appointment and suffer more significant injuries. However, at this time, all of claimant's arguments are speculation. The ALJ found claimant's injury to be scheduled.

### **PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>2</sup>

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an

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<sup>1</sup> K.S.A. 2009 Supp. 44-501 and K.S.A. 2009 Supp. 44-508(g).

<sup>2</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.<sup>3</sup>

K.S.A. 44-510d(a)(12) states:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

. . . .

(12) For the loss of a forearm, 200 weeks.

The ALJ has determined, at least for preliminary purposes, that claimant has suffered a scheduled injury in this matter. That issue, though disputed by claimant, is one of nature and extent.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues where it is alleged the administrative law judge exceeded his or her jurisdiction and the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?<sup>4</sup>

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<sup>3</sup> K.S.A. 2009 Supp. 44-501(a).

<sup>4</sup> K.S.A. 44-534a(a)(2).

Additionally, the Board may review those preliminary hearing orders where it is alleged that an administrative law judge has exceeded his or her jurisdiction or authority in providing or denying the benefits requested.<sup>5</sup>

The Board does not have the authority to review disputes regarding the nature and extent of a claimant's injuries and disability on an appeal from a preliminary hearing order. Additionally, the Board has previously held that TPD is not to be awarded when a claimant has suffered a scheduled injury under K.S.A. 44-510d.<sup>6</sup> Therefore, for the administrative law judge to deny TPD, when finding only a scheduled injury has been suffered, would not be beyond that administrative law judge's authority and jurisdiction.

Claimant disputes the ALJ's finding of a scheduled injury. This Board Member finds that claimant's arguments deal with the nature and extent of claimant's injuries and disability. None of claimant's arguments raise an issue over which the Board would take jurisdiction on an appeal of a preliminary hearing order. Therefore, claimant's appeal of this matter should be and is dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>7</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

### **CONCLUSIONS**

Claimant has failed to raise an issue over which the Board would take jurisdiction on an appeal of a preliminary hearing order. Therefore, claimant's appeal from the preliminary hearing Order of November 30, 2010, is dismissed. The Order remains in full force and effect.

### **DECISION**

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge John D. Clark dated November 30, 2010, remains in full force and effect and claimant's appeal is dismissed.

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<sup>5</sup> K.S.A. 2009 Supp. 44-551(2)(A).

<sup>6</sup> *Goldsmith v. State of Kansas*, No. 1,050,744, 2010 WL 4009129 (Kan. WCAB Sept. 27, 2010).

<sup>7</sup> K.S.A. 44-534a.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January, 2011.

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HONORABLE GARY M. KORTE

c: Roger A. Riedmiller, Attorney for Claimant  
Eric K. Kuhn, Attorney for Respondent and its Insurance Carrier  
John D. Clark, Administrative Law Judge